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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 13-CR-607

-against-

US District Court  
Central Islip, NY

PHILLIP A. KENNER a/k/a  
PHILIP A. KENNER, and  
TOMMY C. CONSTANTINE a/k/a  
TOMMY C. HORMOVITIS,

Defendants.: July 8, 2015

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TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

KELLY T. CURRIE  
United States Attorney  
One Pierrepont Plaza  
Brooklyn, New York 11201  
By: JAMES MISKIEWICZ, ESQ.  
SARITHA KOMATIREDDY, ESQ.  
United States Attorneys

For the Defense:

RICHARD D. HALEY, ESQ.  
For Defendant Kenner  
  
ROBERT LaRUSSO, ESQ.  
ANDREW L. OLIVERAS, ESQ.  
For Defendant Constantine

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Proceedings recorded by mechanical stenography.  
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*Stephanie Picozzi, CRR, RPR*  
*Official Court Reporter*

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1 THE CLERK: Calling case 13-CR-607, United  
2 States v. Kenner and Constantine.

3 Appearances.

4 MR. MISKIEWICZ: James Miskiewicz for the United  
5 States.

6 MS. KOMATIREDDY: Saritha Komatireddy for the  
7 United States.

8 THE COURT: Good afternoon.

9 MR. LaRUSSO: Robert LaRusso for  
10 Mr. Constantine.

11 MR. OLIVERAS: Andrew Oliveras for  
12 Mr. Constantine.

13 THE COURT: Good afternoon.

14 MR. HALEY: Rick Haley for Mr. Kenner to my  
15 left.

16 THE COURT: Good afternoon.

17 (Court Exhibits 7, 8 and 9 received in  
18 evidence.)

19 THE COURT: We received three notes this  
20 morning. The first was marked Court Exhibit 7. The  
21 lawyers have all of these: We changed our mind. We do  
22 not need Ron Richards' testimony read.

23 Then we received a note: Is there an operating  
24 agreement for AZ Eufora Partners, Standard Ventures LLC.  
25 Then asks for various exhibits and a book of text

1 messages.

2 Then we received the latest note asking for the  
3 e-mails, GX 28.1 through 28.11. So that one is easy.

4 To go back to Court Exhibit 8, I think you  
5 agreed on AZ, no such document was introduced into  
6 evidence, correct?

7 MR. HALEY: I believe that's correct.

8 MR. LaRUSSO: That's correct.

9 THE COURT: Standard Ventures LLC.

10 MR. MISKIEWICZ: There is TG2, Government  
11 Exhibit TG2.

12 THE COURT: What is it?

13 MR. MISKIEWICZ: TG2?

14 THE COURT: TG2 is the Standard Ventures  
15 operating agreement?

16 MR. MISKIEWICZ: It's a transfer. It's the  
17 transfer Timothy Gaarn testified about dated August 2005  
18 transferring -- transferring to Timothy Gaarn AZ Eufora  
19 Partners 3 and 8.4 percent member interest. That's the  
20 only TG2 we know of.

21 THE COURT: That's not an operating agreement.  
22 It's my understanding the same thing I will say, there is  
23 no such document with respect to Standard Ventures,  
24 however, I am providing you with a transfer agreement that  
25 was introduced into evidence, it's not an operating

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1 agreement. Right?

2 MR. HALEY: I would agree, Judge.

3 THE COURT: Then the other exhibits they gave us  
4 the numbers for. We are in agreement on that?

5 MR. HALEY: No, your Honor. Here is the issue.  
6 They have K80. K80 was introduced yesterday. That's the  
7 CR Gentry spread sheet. Kenner 80 also bears the  
8 designation of C140 as introduced by Mr. Constantine.

9 I'm a little mystified why they are asking for  
10 K80 only insofar as your Honor can remind them K80 was  
11 previously provided, the CR Gentry spread sheet. As  
12 relates to what they are identifying as K79, K84 and K85,  
13 no K79, K84 and K85 was introduced into evidence. I don't  
14 know specifically what they are referring to, Judge.

15 They may be referring to K86 and K87. If I  
16 might simply ask perhaps your Honor request they identify  
17 the nature of the document because they are taking notes,  
18 maybe I misspoke, maybe they took the note incorrectly in  
19 connection with those exhibits.

20 THE COURT: You must have marked something.

21 MR. HALEY: I must have, Judge. I have no idea  
22 what K79 is. I may very well at one point if I was going  
23 sequentially had it marked, someone wrote it note down. I  
24 don't know the answer to that.

25 THE COURT: K79, K84, K85, we will say there

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1 were no exhibits for those numbers introduced into  
2 evidence but if they can describe the document, maybe it's  
3 been miss numbered.

4 MR. HALEY: Thank you. That would be my  
5 request.

6 MR. MISKIEWICZ: That would also be true, your  
7 Honor, of GX3500, there is no such exhibit.

8 MR. OLIVERAS: C166 also, your Honor.

9 THE COURT: All right. We do have a couple. We  
10 have GX210.

11 MR. MISKIEWICZ: Yes, 2010, GX2010. We have  
12 located all the other exhibits we could find.

13 THE COURT: Can you tell me what we have?

14 MR. MISKIEWICZ: Yes. They specifically wanted  
15 the book with the text messages. That is Government  
16 Exhibit 7401 through 7456. It's here. It's in a binder.  
17 We have located TG2 which we discussed. There is a  
18 Government Exhibit 769 which is the patent security  
19 agreement. There is a Government Exhibit 2010.  
20 Mr. Constantine introduced C161 and 162. Those are  
21 purchase agreements for Neptune and Eufora as well as a  
22 loan conversion agreement for Eufora Capital. Then lastly  
23 there are a series of I guess tax or e-mail messages that  
24 they -- that's Exhibit Number 9, 208.1 through 208.11. We  
25 have located those.

1 THE COURT: Give me one second.

2 (Pause)

3 THE COURT: K80 is also C140, is that what it  
4 was?

5 MR. OLIVERAS: Yes.

6 MR. HALEY: Yes. Your Honor, CR Gentry spread  
7 sheet. It's identified as such.

8 MR. LaRUSSO: Your Honor, you will probably  
9 remember you looked at this yesterday. This was the  
10 spread sheet.

11 MR. HALEY: I misspoke.

12 MR. LaRUSSO: K80 was the one that went in  
13 yesterday. That was our document not received.

14 MR. HALEY: It was my mistake. K80 is that  
15 document.

16 THE COURT: Which they have already.

17 MR. LaRUSSO: They have.

18 THE COURT: I will say in response to these two  
19 notes, actually, they asked for AZ Eufora yesterday at the  
20 end of the day. For AZ Eufora Partners operating  
21 agreement, no such document is introduced into evidence.  
22 Standard Ventures operating agreement, no such document is  
23 introduced into evidence. However, I am providing you  
24 with a transfer agreement related to Standard Ventures,  
25 Government Exhibit TG2. With respect to your request for

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1 other particular numbered exhibits, K80 which is also  
2 marked as C140, an e-mail, you already have. We are  
3 providing you with GX210, GX769, C161 and 162, the book of  
4 text messages which is GX7401-7456. You asked for K79,  
5 K84, K85 as well as GX3500 and C166. There are no  
6 exhibits by those numbers that have been received into  
7 evidence. But if you give me a description of the  
8 document, perhaps it's under a different number. And then  
9 we are providing you with the e-mails, GX 28.1 through  
10 28.11.

11 MR. HALEY: We also need clarification on  
12 GX3500.

13 THE COURT: I grouped that with your exhibits.

14 MR. HALEY: Very well.

15 THE COURT: And C166, what's that?

16 MR. LaRUSSO: Document used to refresh the  
17 witness' recollection. Judge, as we looked at the record,  
18 it's not received into evidence.

19 THE COURT: Maybe I should be clear. I don't  
20 want them to think because you did use those numbers,  
21 Mr. Haley.

22 Did the government use GX3500?

23 MR. MISKIEWICZ: We may have made reference to  
24 3500 material and the Home Depot tape is 4500. I can't  
25 really tell what they are asking for.

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1 THE COURT: For K79, K,84 K85, C166 I will say  
2 although documents were marked with those numbers, they  
3 were not received into evidence and, therefore, cannot be  
4 provided but if they are thinking of a different exhibit,  
5 they can gave a description.

6 MR. HALEY: Thank you. I would like that  
7 request be made as well. They are looking for something  
8 obviously.

9 THE COURT: They could be. They may not be  
10 putting down the correct documents.

11 MR. MISKIEWICZ: Your Honor, will you advise  
12 them there was no GX3500?

13 THE COURT: Yes.

14 MR. MISKIEWICZ: One other thing, you had said  
15 GX210. I think they are asking for 2010. We do have  
16 that.

17 THE COURT: I misspoke.

18 MR. LaRUSSO: The only other thing, Judge, in  
19 terms of being accurate, they date Court Exhibit 9  
20 yesterday. I don't know if you want that on the record;  
21 yesterday. They dated it July 7. Today is July 8.

22 THE COURT: Okay. I will let them know. The  
23 others they got right.

24 MR. HALEY: Your Honor, I don't want to add  
25 complexity as relates to there is no GX3500. The Court



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1 will still make inquiry if they can describe the document?

2 THE COURT: Yes.

3 (The jury enters the courtroom.)

4 THE COURT: Please be seated.

5 Good morning -- good afternoon, members of the  
6 jury.

7 I did want to bring you out just to respond to  
8 your notes.

9 There was one from yesterday at the end of the  
10 day as you were leaving where you asked for the AZ Eufora  
11 Partners operating agreements and then the three from  
12 today.

13 First, you advised me you did not need to hear  
14 the readback of Ron Richards' testimony, then asking again  
15 for the AZ Eufora Partners operating agreement and for  
16 some other documents and then another note asking for  
17 e-mails, 28.1 through 28.11. By the way, that was dated  
18 July 7. It is July 8. I know you know that; the other is  
19 July 8. That's fine.

20 So let me respond to your notes.

21 The reason I didn't send back AZ Eufora Partners  
22 operating agreement is that no such document was  
23 introduced into evidence. So there is nothing in the  
24 record for me to send back on that.

25 With respect to the Standard Ventures operating

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1 agreement, my response is the same; no such document was  
2 introduced into evidence. However, I am sending back  
3 something that was introduced which was a transfer  
4 agreement related to Standard Ventures which is GXTG2. So  
5 I will send that document back.

6 And then we do have and we will send back in a  
7 moment -- K80 you asked for and we sent that back  
8 yesterday. That's back there; also marked C140. You have  
9 that back in the jury room already.

10 The other ones we will be sending back are  
11 GX2010, GX769, C161 and 162, the book of text messages  
12 which is GX7401 through 7456. And the e-mails which are  
13 28.1 through 28.11. There were five other exhibits you  
14 requested, K79, K84, K85 and C166 which were not  
15 introduced into evidence so I can't provide those  
16 documents to you, if you are looking for another document  
17 and this is also true, there is another exhibit,  
18 Government Exhibit 3500, I don't believe there was any  
19 although the term 3500 material was mentioned during the  
20 trial, there was no document called Government Exhibit  
21 3500. With respect to those five, it may be a confusion  
22 over a number. If you have a description of the document  
23 that you want, just send back a note describing the  
24 document, maybe it's just a miss identifying of what the  
25 exhibit number was. So you are going -- there are no

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1 documents to be provided to you under those numbers.

2 I think that responds to those notes.

3 I will ask you to return to the jury room and we  
4 will send the documents back we do have in a moment.

5 Thank you.

6 (The jury leaves the courtroom.)

7 THE COURT: Let's go through what we are sending  
8 back then. GXTG2.

9 MR. MISKIEWICZ: GXTG2.

10 THE COURT: GX2010, GX769, C161 and 162.

11 MR. MISKIEWICZ: Yes.

12 THE COURT: The binder, GX7401 through 7456. If  
13 defense counsel wants to take them out of the binder...

14 MR. HALEY: Actually, your Honor, my client and  
15 I were given the opportunity before the Court came to the  
16 bench to look at all the documents.

17 MR. MISKIEWICZ: You want us to remove the  
18 cover?

19 THE COURT: If you want to remove the cover,  
20 that's good.

21 For the record, a U.S. Attorney emblem on the  
22 cover was removed. It's just a black binder now.

23 And GX208.1 through 208.11. Okay.

24 While I have you captive, there are a couple of  
25 rulings that I wanted to amplify and supplement although

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1 at least two of them based upon Mr. LaRusso's positions  
2 are probably moot but I did want to place it on the  
3 record.

4 First, there was no objection to this but I want  
5 the record to be clear why I included it in the  
6 instruction because I did research the issue.

7 There was within the wire fraud instruction what  
8 is commonly known as a conscious avoidance instruction on  
9 the issue of knowledge as relates to the falsity of the  
10 statements. I believed that that instruction, which the  
11 government requested, was proper in this case, that the  
12 standard for that is set forth most recently in a Second  
13 Circuit case, United States v. Goffe, 721 F.3d 113,  
14 Second Circuit 2013, where the Second Circuit reiterated  
15 that the instruction may only be given if, 1, the  
16 defendant asserts the lack of some specific aspect of  
17 knowledge required for conviction and, 2, the appropriate  
18 factual predicate for the charge exists, i.e., the  
19 evidence is such that a rational juror may reach the  
20 conclusion beyond a reasonable doubt that the defendant  
21 was aware of a high probability of the fact in dispute and  
22 consciously avoided confirming that fact.

23 And I believe that those predicate requirements  
24 were met in this case at least sufficiently to trigger the  
25 introduction for the following reason: There is a theory

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1 of the case and, obviously, several different schemes that  
2 the government is alleging, but with respect to various  
3 portions of those schemes on different occasions the  
4 argument could be made by and was made by both  
5 Mr. Constantine and Mr. Kenner that they lacked some  
6 specific aspect of knowledge required for conviction for  
7 fraud because it was the other person who was in charge of  
8 it. Just by way of example, although there are numerous  
9 examples of this, but with respect to Global Settlement  
10 Fund, Mr. Kenner's position was I wasn't involved in the  
11 Global Settlement Fund because it was Mr. Constantine who  
12 had control over that account. And similarly with respect  
13 to some of the Eufora investment issues, Mr. LaRusso's  
14 argument to the jury was that Mr. Constantine had nothing  
15 to do with, for example, what went on with respect to Mr.  
16 Gaarn and that bank account, that that was solely Mr.  
17 Kenner and Mr. Constantine wasn't involved in any  
18 representations related to that. And, again, there were  
19 similar issues, for example, with Mr. Privitello where one  
20 person may have been dealing more directly or both of them  
21 may have had interactions with them at various times with  
22 the investment issues but one person then was more  
23 involved in the movement of the money or some other aspect  
24 with respect to the investment itself. Because of those  
25 assertions, the defense clearly asserted a lack of some

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1 specific knowledge that would be required for fraud, a  
2 fraud conviction.

3 And I concluded the second requirement was met,  
4 that based upon the government's evidence, assuming the  
5 jury credited the government's witnesses and drew all  
6 reasonable inferences in the government's favor, that  
7 there could be a finding by the jury that in each of those  
8 situations that the defendant was aware of the high  
9 probability of the fact in dispute and consciously avoided  
10 confirming that fact. For example, when Mr. Kenner and  
11 Mr. Constantine are pitching or explaining to the  
12 investors what the purpose of the Global Settlement Fund  
13 is, even if Mr. Kenner was not aware of every particular  
14 transaction as related to the fund, an argument could be  
15 made that based upon all the other circumstances  
16 surrounding his relationship with Mr. Constantine and the  
17 other matters and issues that were ongoing, he was aware  
18 of the high probability of how the funds were being used,  
19 or as the government would argue misused, and consciously  
20 avoided confirming that fact through his own  
21 investigation. And with similar facts, to me, there is  
22 also a clear rational finding on the other aspects of the  
23 case vis-a-vis Mr. Constantine consciously avoiding  
24 confirming whether or not certain representations were  
25 made with respect to Eufora and the money for Eufora were

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1 accurate and whether the money was in fact being used in  
2 that fashion.

3 So I believe the factual predicate existed for  
4 that with respect to certain aspects of the case against  
5 both defendants. And the instruction itself tracks, I  
6 think the instruction was used actually in the case  
7 Mr. LaRusso had with me previously, Abdulla, and it tracks  
8 the various guidance that the Second Circuit gave as to  
9 what should be or not be in terms of the language of the  
10 instruction itself. I believe that's a very solid  
11 instruction that I gave based upon Second Circuit law.

12 MR. LaRUSSO: May I conclude and make a comment  
13 in regards to that? I do remember the Abdulla case very  
14 well. In regards to closing a blind eye, conscious  
15 avoidance, that usually entails in some way the fact that  
16 a person is confronted with a set of facts that he should  
17 have either inquired but instead turned a blind eye.

18 I think in this particular case, events with  
19 Eufora, Judge, Mr. Kenner's representations to his  
20 investors was not necessarily something that would cause  
21 Mr. Constantine to inquire about or close his mind to. He  
22 would let's say get a call that a hockey player investor  
23 is buying Eufora. I don't know why he would say: What  
24 did you tell them, what's the obligation? He is not  
25 closing a blind eye. At this point these investments have

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1     been going on for some time. I didn't think in that  
2     context the request for conscious avoidance was really  
3     necessary. It wasn't turning a blind eye. It was  
4     accepting an investment.

5             In this case I believe most of them would be the  
6     purchases of stock of his own to CMG. I'm not seeing the  
7     factual predicate as clearly as I saw the other you  
8     mentioned in regard to GSF.

9             THE COURT: For example, not to go back to  
10    particular hockey players and particular portions of the  
11    trial but, for example, if they are pitching an investor  
12    together regarding Eufora and this is for commercials to  
13    get us over the hump and meanwhile then the government's  
14    argument is then some of that money didn't go for those  
15    purposes, went to Mr. Kenner's personal uses or to some  
16    other misappropriation, didn't deal with what the  
17    representation was, even if Mr. Constantine was not the  
18    person who was going to be directly involved in getting  
19    the money from them, money was going to go from --  
20    Mr. Kenner was going to somehow be involved, obviously, in  
21    taking that person's money and getting it to  
22    Mr. Constantine. The argument would be from the  
23    government's standpoint Mr. Constantine was aware based on  
24    the circumstances of the high probability that in fact the  
25    money was not going to be used for -- the government



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1 argued he knew for sure there wasn't conscious avoidance,  
2 he knew but the fall back position would be that based  
3 upon the circumstances he knew those people were not going  
4 to end up with whatever interest they were being told  
5 and/or the money was not going to be used for the  
6 particular thing that it was being represented by he  
7 and/or Mr. Kenner at any given time. That's all along the  
8 lines of what I was thinking.

9 The government didn't actually argue that in  
10 their summation even though the instruction is in there.  
11 The government chose to not, I guess it's a strategic  
12 matter, mix the message, suggest the alternative theory.  
13 I believe there was a sufficient basis in the record for  
14 both defendants. I didn't spell it out in the  
15 instruction, what it related to, does it relate to GSF or  
16 Eufora but I think it could potentially apply to both of  
17 them at a minimum. I haven't really thought about Hawaii.  
18 I was thinking more about Eufora and GSF. When I saw the  
19 government's instruction I thought about what evidence  
20 there was to support a conscious avoidance instruction,  
21 those are the ones I immediately thought of.

22 Then my ruling, again, there was no objection,  
23 my thinking was similar with respect to the Pinkerton  
24 charge. The Pinkerton charge is appropriate where there  
25 is evidence of a conspiracy but one of the defendants

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1 involved in the conspiracy may not have been involved in  
2 the actual substantive act that lead from the conspiracy  
3 itself. So it was my view that, again, assuming the jury  
4 found a conspiracy existed, for example, the Eufora fraud,  
5 that's what it relates to, those are the substantive  
6 counts in this cases, if a jury concluded Mr. Kenner and  
7 Mr. Constantine at some point agreed money people was  
8 investing in Eufora was going to be diverted to other  
9 uses, personal uses, and not going to any interest in the  
10 company, the fact that the wire transfer involved in one  
11 instance Mr. Kenner or another instance Mr. Constantine,  
12 it would not shield them from liability under a Pinkerton  
13 theory. If you make such an agreement you both go out and  
14 implement that agreement, some of it Mr. Kenner allegedly  
15 billing through Mr. Gaarn, some of it being done through  
16 Mr. Privitello, the fact that one defendant who is in that  
17 conspiracy did not directly participate in that particular  
18 wire transaction does not mean there is no liability under  
19 Pinkerton. Pinkerton allows for liability as long as  
20 those five requirements, as I instructed the jury, are  
21 met. I believe there was a factual predicate for that  
22 instruction as well.

23           There was no objection, but, again, the  
24 government didn't explicitly rely on that in their  
25 summation but certainly the jury would be within their

1 right to consider that instruction in evaluating the  
2 evidence in this case.

3 MR. LaRUSSO: In regards to that, your Honor, if  
4 you remember my discussion about a special verdict in  
5 regards to the purposes of the conspiracy and the reason  
6 behind that request was primarily what the Court just  
7 said, that there was a possibility. When you look at the  
8 Gaarn stock sales or -- "stock sales" goes against my  
9 summation -- interest in Eufora, the jurors could have  
10 found there was no conspiracy, that Mr. Kenner had done it  
11 on his own. And by a special verdict, we would have known  
12 whether or not they would have found a conspiracy. If  
13 they don't find a conspiracy regarding Eufora and the  
14 Gaarn transfers, then Mr. Constantine can't be held liable  
15 under Pinkerton at all. That was my major concern.  
16 That's why I brought it up before. That was the  
17 complexity of this case that brought that legal issue to  
18 mind.

19 I understand Pinkerton, if the jury finds  
20 conspiracy, if they don't find conspiracy, that Kenner did  
21 it on his own, that charge could result in a finding of  
22 responsibility on Mr. Constantine's part when factually  
23 they may not have found that.

24 THE COURT: That's my next ruling, going to  
25 relate to the special verdict sheet. Again, you withdrew

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1 that request. I was going to deny it, in any event.

2 I don't disagree with what you are saying. They  
3 would have to find the conspiracy existed before they  
4 could invoke Pinkerton. There is no conspiracy, there is  
5 no Pinkerton theory liability and a special verdict sheet  
6 would confirm that.

7 But my response to that is, first of all, the  
8 Pinkerton instruction couldn't be clearer when it lays out  
9 the five requirements. One of the requirements is there  
10 has to have been a conspiracy in the first place. So they  
11 are properly instructed that they have to find a  
12 conspiracy in the first place. It cannot be clearer in  
13 the Pinkerton instruction. I have to assume they will  
14 follow that instruction. As I noted, the time this issue  
15 came up with regard to the special verdict form, there are  
16 always various elements to a crime, within every crime  
17 there are various elements. There can always be a concern  
18 that a jury didn't properly consider one element and we  
19 don't ask them for a special verdict in every element of  
20 every crime.

21 I understand there is not exactly that  
22 situation. In my view this is similar to that and the  
23 charge is clear. So I don't have a real concern that  
24 somehow they are going to say Mr. Constantine wasn't  
25 involved in any Eufora conspiracy with Mr. Kenner but he

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1 is guilty of the substantive charges. In Pinkerton --  
2 they would have to completely ignore the Pinkerton  
3 instruction. So I don't have a real concern the jury is  
4 going to do that in this case.

5 But let me place my ruling -- it's not really a  
6 ruling because the request was withdrawn, but I was  
7 prepared if the request was continued to be asserted to  
8 deny it for the following reasons. I did do research on  
9 the special verdict issue and the Second Circuit in the  
10 case in 2011, United States v. Applins, 637 F.3d 59,  
11 Second Circuit 2011, in some detail discussed the use of  
12 special verdicts in criminal cases. And two things come  
13 out of that case. One is that it's a completely  
14 discretionary decision by the District Court, within the  
15 sound discretion of the District Court, as to whether or  
16 not in any particular situation a special verdict should  
17 be used.

18 And the Second Circuit in terms of providing  
19 guidance on that -- let me repeat what they said on that.  
20 They said: The use of special interrogatories is not  
21 required as we have declined to delineate bright line  
22 rules for determining whether such interrogatories should  
23 be employed or in what form or promulgated criteria.  
24 District Courts are bound to consider rather than commit  
25 to the decision whether and how to permit special

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1 interrogatories in such cases to the broad discretion of  
2 the District Court.

3 In that case they note they have recognized what  
4 they call preference for special interrogatories in  
5 particular complex criminal cases notwithstanding what  
6 other courts have said is the traditional distaste for  
7 special interrogatories in criminal cases. But in that  
8 case, the specific issue was on predicate acts in a RICO  
9 case whether or not you should ask a jury for a special  
10 verdict as to which particular predicate acts they found  
11 in connection with a RICO charge. So I don't think it --  
12 even then it's discretionary. I don't think this  
13 situation is equivalent to that situation. And I'm not  
14 going to -- this is not a complicated criminal case. It's  
15 a complicated criminal case but I don't think the  
16 instructions are complicated. The wire fraud instruction  
17 is very straightforward. Conspiracy instruction is very  
18 straightforward. I was clear, explicit in making sure  
19 that I was clear to them they had to agree on which  
20 particular objective they were finding the conspiracy on  
21 even though there were three objectives. The instruction  
22 could not be clearer it had to be unanimous as to at least  
23 one of the reasons I indicated. The process of making  
24 them decide three objectives even though the law only  
25 requires them to find one of the objectives unanimously to

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1 be proven I think puts a burden on a jury that is not  
2 required under the law. That's why I declined to divide  
3 up the verdict sheet in that way.

4 On the issue Mr. Constantine raised with  
5 Mr. LaRusso, Mr. LaRusso passed to me about the issue of  
6 sentencing, the Courts -- obviously, this could be briefed  
7 more if there is a conviction in connection with  
8 sentencing but the Courts seem to specifically address  
9 that issue and say that it's still up to the Court to  
10 determine whether there are multiple objectives which one  
11 should be used for purposes of punishment, under the  
12 sentencing standard which should be used for purposes of  
13 punishment as long as it doesn't increase the statutory  
14 maximum. If the statutory maximum increases as a result  
15 of one particular objective being found versus another,  
16 then the trial court can't make that finding. If it's not  
17 going to increase the statutory maximum where within the  
18 statutory maximum a sentence should lie is still even in  
19 the form of a general verdict within the decision of the  
20 sentencing court.

21 And there is a Third Circuit case that dealt  
22 exactly with that situation, United States v. Conley, 92  
23 F.3d 157, 1996 case. It said trial court's determination  
24 of objects of conspiracy for sentencing guideline purposes  
25 after a jury rendered a general verdict which did not

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1 designate the object of the conspiracy did not violate the  
2 defendant's Sixth Amendment right to a jury trial. And  
3 similarly, as I pointed out the other day, the Supreme  
4 Court has said that for purposes of a due process claim  
5 challenging the sufficiency of the evidence in a  
6 multi-object conspiracy count where there was a general  
7 verdict, that that also cannot -- is not cognizable as a  
8 claim.

9 And on the issue of whether or not to give the  
10 instruction, there is a District Court case, U.S. v.  
11 Rienzi, 1996 West Law 605130, Eastern District of  
12 Pennsylvania, 1996. In fact, it was an ineffective  
13 assistance of counsel claim claiming that the lawyer  
14 should have asked for a special verdict or interrogatories  
15 to determine the object of the conspiracy which returned a  
16 guilty verdict. And the Court rejected that and explained  
17 what I just explained, that it's within the discretion of  
18 the Court citing the Given (ph) case and Conley case and  
19 some other cases. So as a matter of discretion, that's my  
20 ruling as it relates to the case.

21 Finally, again, I think this issue was  
22 ultimately mooted out because my recollection is that  
23 Mr. LaRusso withdrew any privilege claim relating to Ron  
24 Richards' testimony but I ruled that even dependent of any  
25 such waiver, his testimony was permissible even over an



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1 objection for two reasons. First, the Second Circuit has  
2 over and over again concluded that absent special  
3 circumstances disclosure of client identity and fee  
4 information are not privileged including a case *Vingelli*  
5 *v. United States*, 992, F.2d 449, Second Circuit 1993. And  
6 in that case, the Court said we have determined in the  
7 absence of special circumstances client identity fee  
8 arrangements do not fall in the attorney-client privilege,  
9 not the kind of disclosures having been made absent the  
10 privilege disclosure does not incapacitate the attorney  
11 from rendering legal advice. Cites a string of cases.

12 The Second Circuit explains what are those  
13 special circumstances. In that case they discuss a Ninth  
14 Circuit case where the special circumstance was that the  
15 disclosure itself would reveal a confidential  
16 communication between the attorney and client. The matter  
17 was to determine a tax liability, the disclosure of what  
18 the matter was. If there was no IRS examination, it was a  
19 confidential communication. That's the only special  
20 circumstance that really comes up in these types of cases.

21 The fact that the information -- the fee or the  
22 client identity is itself incriminating doesn't make it  
23 privileged. The second case made that clear, *U.S. v.*  
24 *Goldberger and Dubin*, 935 F.2d 501. And as a result of  
25 these cases, numerous courts in similar circumstances

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1 similar to what I was confronted with allowed the records  
2 to come in. U.S. v. Weissberg, 2011 West Law 1327689,  
3 Eastern District of New York 2011, where the records  
4 reflected attorneys worked on escrow accounts,  
5 communicated or met with certain individuals but it did  
6 not reveal the content of attorney advice and the District  
7 Court found them not to be privileged.

8 Another case Gardenville, LLC v. Travelers  
9 Property Casualty, 2004 U.S. District Lexis, 8846 Western  
10 District of New York, 2004, citing Second Circuit law made  
11 clear to the extent communication doesn't involve legal  
12 advice, simply transferring money or title, it's not  
13 privileged. So I don't believe Mr. Richards' testimony  
14 regarding the client information and fees with respect to  
15 litigation, public litigation and other matters could  
16 possibly be privileged. But I noted even if it were, the  
17 crime fraud exception applies. The standard for the crime  
18 fraud exception is as set forth in U.S. v. Chervin, 2011  
19 U.S. District Lexis 106929, Southern District of New York  
20 September 21, 2011. That case explains that the Second  
21 Circuit held a party seeking to invoke the crime fraud  
22 exception must prove a factual basis for probable cause to  
23 believe a fraud or crime has been committed, that the  
24 communication in question was in furtherance of the fraud  
25 or the crime.

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1           It's clear a fraudulent objection of the scheme  
2           need not to be established definitively, only a reasonable  
3           basis for believing the objective was fraudulent. I  
4           concluded, again, based on the other evidence in the case  
5           there was a sufficient basis to find probable cause that a  
6           fraud was being committed with respect to the GSF and that  
7           the communications with Mr. Richards to set up the account  
8           and allow release of certain monies relating to that  
9           account for matters that were unrelated to any litigation  
10          related to the investments, that there was a sufficient  
11          basis for that standard to be met with respect to the  
12          communications between Mr. Richards and Mr. Constantine.

13           The Second Circuit made clear -- the Supreme  
14          Court made clear the fact the attorney was not aware of  
15          the fraudulent nature of the account or the transaction  
16          doesn't mean that it's somehow not within the exception.  
17          Attorney-client privilege does not attach to furtherance  
18          of a crime of fraud regarding the attorney's lack of  
19          knowledge. He is being consulted in furtherance of that  
20          crime of fraud, *Clark v. United States*, 289 U.S. 1, 1933,  
21          Supreme Court case. The fact Mr. Richards may not have  
22          been, as I noted -- no findings that is to Richards by the  
23          Court any knowledge by Mr. Richards of any fraudulent use  
24          of the funds does not affect the analysis of the crime  
25          fraud exception but based on the other evidence I heard in

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1 the case.

2 I think that's all I have for now.

3 You can take your lunch break.

4 (Whereupon, a recess was taken.)

5 THE CLERK: Everyone be seated.

6 THE COURT: Everybody is present in the  
7 courtroom.

8 They asked for a walk. Michele took them out  
9 for a walk. Then Court Exhibit 11 -- that's Court Exhibit  
10 10. Court Exhibit 11 asks for the Money Magazine article.  
11 Let's just send that back now.

12 MR. HALEY: Yes.

13 THE COURT: What exhibit number is that?

14 MS. KOMATIREDDY: 726L.

15 THE COURT: Everybody is okay with that going  
16 back?

17 MR. HALEY: Yes.

18 MR. LaRUSSO: No objection.

19 THE COURT: Then they ask for any testimony or  
20 e-mails or documents regarding the Led Better/Sag Harbor  
21 deal. We can talk about this for a minute. What I  
22 suggest we do is put aside the testimony for a moment.  
23 That's I think a monumental task. I think that would take  
24 many hours, correct?

25 MR. MISKIEWICZ: Yes. We are working through it

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1 but there is probably maybe ten, 11, 12 witnesses that  
2 testified in some form about Sag Harbor.

3 THE COURT: For example, Mr. Kenner went back  
4 and forth on one occasion so it's not only in one spot.

5 MR. MISKIEWICZ: That's what we are doing,  
6 trying to isolate page and line citations, then sidebars  
7 in between so it's going to take us -- I don't think we  
8 will be done today.

9 THE COURT: It's 4:10.

10 One option with respect to that, just to make  
11 sure and that's a pretty unusual request, I could tell  
12 them what we are doing, I could tell them we are  
13 interpreting this to mean all the testimony.

14 MR. HALEY: I don't want to interrupt. I think  
15 we made great progress. From my perspective, when they  
16 ask for all the testimony regarding Sag Harbor, I would  
17 like to give them all the testimony. We have made great  
18 progress in terms of isolating.

19 THE COURT: I know but it will probably take  
20 over a day to read all that back, wouldn't it?

21 MR. MISKIEWICZ: Yes.

22 MR. HALEY: You are asking me for a time  
23 estimate?

24 THE COURT: I'm familiar with readbacks. That  
25 readback yesterday was 11 pages, took 20 minutes.

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1 MR. HALEY: Whatever the Court thinks is  
2 appropriate.

3 THE COURT: I think it would take hours. I  
4 don't think I'm under estimating. Again, going from  
5 memory, I was thinking ten to 15 witnesses, Mr. Kenner  
6 testified at length about it, Mr. Berard testified at  
7 length about it, Mr. Manfredi.

8 MR. MISKIEWICZ: Shimon Betesh. Michael Peca,  
9 Kristin Peca, smaller portions but, yes, they also  
10 testified about it.

11 THE COURT: Theoretically it involves the  
12 testimony of the charts that involve Sag Harbor, again,  
13 which is another whole set of witnesses who potentially  
14 could be included in that.

15 Why don't we do this first, see if we can  
16 isolate the documents. Do we have agreement on the  
17 documents?

18 MS. KOMATIREDDY: I think we do. First of all,  
19 there is a binder that pertains to it and we are in  
20 agreement with the binder. The binder includes a number  
21 of things separately admitted as exhibits without being  
22 redundant of those -- I'm happy to read those exhibit  
23 numbers into the record and send the binder back.

24 Mr. Haley and we have isolated another stack of  
25 exhibits we are confident is most, not all, of the

1 remaining actual documents; obviously, we can double-check 6154  
2 it tonight but I think we have isolated a stack.

3 THE COURT: Let's put on the record what we  
4 isolated.

5 MS. KOMATIREDDY: The binder is admitted as  
6 Binder 7. Binder 7 includes the following exhibits --

7 MR. HALEY: I hate to interrupt the Court, the  
8 prosecutor, the only thing I would like to occur is my  
9 client was looking through these documents, hadn't yet  
10 seen the binder documents. I want him to be aware. If we  
11 can walk over or whatever is most appropriate.

12 THE COURT: Yes.

13 (Pause)

14 THE COURT: Let me make sure I understand.  
15 There is an additional bank record showing money going  
16 back to Mr. Kaiser?

17 MR. HALEY: I will allow my client, your Honor.  
18 He has a better understanding.

19 DEFENDANT KENNER: Yes, sir, your Honor. After  
20 the closing of the Led Better parcel in October of 2006,  
21 Mr. Kaiser received 300,000 back from an escrow account  
22 and into his bank account at Commerce Bank. It's two days  
23 before he repays the loan he took for the Led Better loan.  
24 So we have in evidence BNK-MM-139 which is the November  
25 2006 statement from Mr. Kaiser. It's the previous month's

1 statement.

2 THE COURT: Is that in evidence?

3 MS. KOMATIREDDY: Not from the government, your  
4 Honor.

5 MR. HALEY: The only thing I may add, it is part  
6 of what was at least provided to us in Rule 16 discovery  
7 as the bank records associated with the transaction. You  
8 can pull it up on our database.

9 THE COURT: It doesn't matter whether it was  
10 provided in discovery. It wasn't in evidence. You can  
11 double-check. It's 4:20. You and your client can  
12 double-check tonight to see if the October statement is in  
13 evidence. I think there was testimony regarding that.

14 But other than that, is the binder okay other  
15 than that?

16 MR. HALEY: The only issue, your Honor, I will  
17 let the government make the offer of proof, my client is  
18 of the view Government Exhibit 21, which is also included  
19 in the binder, is not relevant or material to the request  
20 of the jury.

21 MS. KOMATIREDDY: I am happy to make an offer of  
22 proof. It's actually -- this was included in the binder  
23 as 20 to 40. For the record, the binder is admitted as an  
24 exhibit. The reason it's relevant to Sag Harbor is  
25 because in the indictment as charged, the money is stolen



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1 October 2006 and as part of the fraud, interest payments  
2 are made on the line of credit to conceal that theft. The  
3 actual charged wires, accounts 7 and 8, are the last two  
4 payments made on the line of credit and these so-called  
5 Ponzi scheme charts we have used show the connection when  
6 the moment the money is stolen, every payment that leads  
7 to the actual charged wires which is the totality of the  
8 fraud. So that's why --

9 THE COURT: Showing the source of the money?

10 MS. KOMATIREDDY: Yes. Special Agent Petrellese  
11 closed the loop on that as a summary chart witness when he  
12 explained the Michael Peca line of credit from the moment  
13 the Led Better money was stolen, traced each payment up to  
14 the end.

15 THE COURT: I think that's okay.

16 MR. HALEY: Thank you.

17 THE COURT: So we have the binder.

18 MS. KOMATIREDDY: 7, I believe.

19 MR. HALEY: Binder 7.

20 THE COURT: Then what are the other documents?

21 MR. HALEY: Your Honor, thank you. We are in  
22 agreement.

23 THE COURT: Can we go through what the other  
24 exhibits are besides Binder 7?

25 MS. KOMATIREDDY: Yes. Your Honor, do you want

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1 me to read the exhibits in Binder 7?

2 THE COURT: Yes, why don't we do that.

3 MS. KOMATIREDDY: Binder 7 includes chart 8,  
4 chart 9, charts 20 through 40, stip 29, 1903, 1904, 703,  
5 2001, 2002, 2003, 1401, 941, 940, 1602, 2005, 2006, 2007,  
6 2008, 1701, 1702, 1703, 1402, 1403 and 715. The other  
7 exhibits we agreed upon are 701C, 701C-A, certified deed,  
8 702, 6015, 704, 705, three transcripts admitted as aids to  
9 the jury, 505.1T.

10 THE COURT: Hold on. I normally would not send  
11 back a transcript of a conversation. I would tell them  
12 there are recordings that relate to Sag Harbor. I usually  
13 do not send back an aid; it's not evidence.

14 MR. HALEY: Judge, let me speak to my client.

15 THE COURT: Yes.

16 Did you offer that or the government offered it?

17 MR. HALEY: This is a Government Exhibit.

18 MS. KOMATIREDDY: Should I read off the rest of  
19 the document numbers?

20 MR. HALEY: We consent to allow these aids in,  
21 if your Honor -- I see a grimace.

22 THE COURT: It's a little -- I tell them it's  
23 not evidence, the tape is evidence. I said to them during  
24 my instructions if you want to hear a tape, I will bring  
25 you out. It's inconsistent with how I admit them and what

6158

1 I told them I would do.

2 My preference would be to say there are three  
3 recordings, we can give them the number, portions of  
4 recordings have been identified as relate to Sag Harbor.  
5 Tomorrow morning we will bring you out to hear those.  
6 Obviously, if everyone consents, I will allow them to use  
7 the aids but I think we should do it that way.

8 MR. HALEY: I will defer to the Court's better  
9 judgment.

10 MS. KOMATIREDDY: For the record, those  
11 recording numbers, the clips, are admitted as 505.1,  
12 505.2, 505.3. The remaining documents, the Government  
13 Exhibits 6504, 716, 717, 718, 2162, 1490F, 1490G, 2081B,  
14 2082A and 1490C.

15 THE COURT: So everyone is in agreement on  
16 those?

17 MR. HALEY: We are. There are three Kenner  
18 Exhibits that I believe we agreed to.

19 THE COURT: We didn't get a note but the CSO  
20 says they want to go home. I will bring them in and tell  
21 them we think we have gotten the Sag Harbor documents. I  
22 want to say on the testimony, I don't want to go through  
23 this and have it open. I want to tell them we think there  
24 is approximately ten or so witnesses who testified about  
25 Sag Harbor and we are going through it to -- I will tell

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1     them we are interpreting it. They want all testimony of  
2     any witness regarding Sag Harbor, approximately ten or so  
3     of those witnesses. We are going through and isolating.  
4     Our intention is to read those back in the order that they  
5     testified unless they want something else and to tell them  
6     we are going to do the same with the recordings.

7             MR. HALEY: Thank you.

8             MR. LaRUSSO: Very good, your Honor.

9             THE COURT: Obviously, I will tell them we got  
10     the latest note. I'm sure you didn't have a chance to  
11     pull the documents; seems more specific.

12            MR. LaRUSSO: Note 12, I think we have all the  
13     e-mails acknowledging Ranford and should be able to have  
14     that available to the Court in the morning. We just have  
15     to get together with the government.

16            THE COURT: Okay. Good.

17            I will tell them to come in at 10:15 because I  
18     will not get here until 10:30.

19            MR. HALEY: I think we reached agreement.

20            THE COURT: Let's get the jury first and then we  
21     will deal with that.

22            Mr. Haley, put the additional records on the  
23     document.

24            MR. HALEY: To complete the record as far as  
25     Kenner Exhibits are concerned, as relates to the jury's

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1 request, Kenner Exhibit 34, Kenner Exhibit 221, Kenner  
2 Exhibit 222.

3 THE COURT: So everyone is in agreement the ones  
4 the prosecutor identified and the ones Mr. Haley are the  
5 ones that should go back?

6 MR. LaRUSSO: Yes.

7 MR. HALEY: Yes.

8 MS. KOMATIREDDY: Yes, your Honor.

9 (The jury enters the courtroom.)

10 THE COURT: Please be seated.

11 I know it's a little after 4:30. I will let you  
12 go home in a minute. I want to tell you what we are doing  
13 and my intention tomorrow morning, making sure I know what  
14 you are requesting.

15 The Money Magazine article went back to you.  
16 You have that.

17 The next thing you requested was any testimony  
18 or e-mails or documents regarding the led better/Sag  
19 Harbor deal. We have isolated all the documents that  
20 relate to the Sag Harbor transaction and I will send those  
21 back to you even though you are going home. We will put  
22 them in the jury room so you will have them in the  
23 morning. The response to your documents will be in the  
24 jury room.

25 The two things I want to note about that

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1 request, first is there are three portions of recordings  
2 that have been identified as relating to Sag Harbor and,  
3 again, I told you there is a list of recordings. We can't  
4 send those back. So tomorrow morning we will bring you in  
5 to listen to those three portions of those recordings.

6 As relates to the testimony, I am reading that  
7 as you wrote it that you want any witness who testified  
8 during his or her testimony about Sag Harbor. You want  
9 all of those portions of their testimony. We are still  
10 working on that. I think it's probably ten or so  
11 witnesses and unless you tell me otherwise, we are going  
12 to isolate those and then read them back in the order the  
13 witnesses testified during the course of the trial but  
14 that's how I'm interpreting that request.

15 And then the next note requests documents. I  
16 haven't had a chance -- that one I think is clear what you  
17 are asking for. We will put those documents together so  
18 you will have those first thing tomorrow morning too.

19 That's the plan we will follow tomorrow unless  
20 you tell me I'm miss interpreting something you asked for,  
21 otherwise, that's the plan. The only difference, we will  
22 start later. I ask you come at 10:15 tomorrow instead of  
23 9:30.

24 Don't read or listen to anything regarding the  
25 case. Don't discuss the case outside the deliberations.

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1 And, again, you have to wait until all 12 of you arrive  
2 tomorrow morning before you start deliberating.

3 Have a safe trip home and good night.

4 (The jury leaves the courtroom.)

5 THE COURT: I will have my law clerk give those  
6 to Michele to bring back to the jury room, the Sag Harbor  
7 documents.

8 Mr. Miskiewicz, make sure she is taking the  
9 correct ones.

10 Just to go back to the last note to have these  
11 ready to go tomorrow morning, says can we have the bank  
12 statements for Johnson Bank for Eufora for the month of  
13 February 2009.

14 Do you have those?

15 MS. KOMATIREDDY: Yes, Judge; I can get that in  
16 a minute.

17 THE COURT: Then 223 -- excuse me, 2213, bank  
18 statement and 1513 wire transfer instruction.

19 MR. LaRUSSO: Judge, that cross out of  
20 Government Exhibit 601, I believe that's the government  
21 authorization e-mail that Mr. Ranford received from  
22 Mr. Kenner, went in through the government but then they  
23 cross it out and said e-mails acknowledging the Ranford  
24 relationship. So I'm assuming that's included within.  
25 That's the way I read that.

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1 I have identified six e-mails that were between  
2 the hockey players including Mr. Ranford and  
3 Mr. Constantine. I will give these to the government to  
4 look at unless you want them now.

5 THE COURT: Let's do it now. Can you show those  
6 to the government now?

7 My law clerk tells me they are writing another  
8 note; maybe I got something wrong, maybe they are  
9 clarifying something.

10 MS. KOMATIREDDY: Your Honor, for the record,  
11 they requested the Johnson Bank Eufora bank statement for  
12 February 2009. GX2213 is that statement so I think that's  
13 the same thing.

14 THE COURT: Okay.

15 MR. LaRUSSO: Your Honor, I showed the e-mails  
16 that we believe are responsive to the request regarding  
17 the e-mails showing the Ranford/TC relationship, not in  
18 any order but it's C128, C215, C122, C 24 and C 169.

19 THE COURT: The jury asked whether they can come  
20 back at 9:30 and deliberate even if we can't respond to  
21 any notes. I'm okay with that. Any problem with that?

22 MR. MISKIEWICZ: No objection.

23 MR. LaRUSSO: No.

24 THE COURT: If any notes come in between 9:30  
25 and when I get here, we will hold them.



1 MR. HALEY: The earlier the better. I have no  
2 problem with that.

3 THE COURT: We will tell them they can come at  
4 9:30.

5 So is the government in agreement those are the  
6 ones responsive to the e-mail alleging the Ranford and TC  
7 relationship?

8 MR. MISKIEWICZ: These are I think -- one could  
9 broadly construe it that way. They are basically e-mails  
10 in which Mr. Ranford is on a long list of ccs. They are  
11 e-mails. We don't have any objection.

12 THE COURT: Mr. Haley? You want to look at  
13 those two?

14 MR. HALEY: Yes. I'm sure I don't have an  
15 objection.

16 MR. LaRUSSO: Your Honor, my client and Mr.  
17 Oliveras have to be here at 9:30? I will be here.

18 THE COURT: It's up to them. Nothing will  
19 happen until at least 10:15.

20 MR. LaRUSSO: I will have them here by 10:15.

21 THE COURT: When I say nothing is going to  
22 happen, Mr. Constantine, you understand they will be  
23 deliberating starting 9:30. Nothing will happen in the  
24 courtroom until 10:50.

25 DEFENDANT CONSTANTINE: I understand that.

1 THE COURT: The jury will not be coming into the 6165  
2 courtroom before 10:15.

3 MR. HALEY: No objection as relates to the  
4 e-mails.

5 MR. LaRUSSO: C24, C128, C122, C215, C177, C169.  
6 That should be six.

7 THE COURT: You didn't mention 177. Before I  
8 want the government to see that one.

9 You have seen 177, Mr. Haley?

10 MR. MISKIEWICZ: I don't have any objection to  
11 177.

12 MR. HALEY: I have no objection either, Judge.

13 THE COURT: 2213 I will tell them is the bank  
14 statement for February 2009 and then 1513 obviously is the  
15 wire transfer, right?

16 MR. MISKIEWICZ: Yes, your Honor.

17 THE COURT: We are in agreement that completes  
18 that note?

19 MR. MISKIEWICZ: I believe so.

20 MR. HALEY: May I show my client?

21 THE COURT: Sure.

22 MR. HALEY: Yes, it does, Judge.

23 THE COURT: Juror number 1 says she has vacation  
24 plans starting Monday.

25 MR. MISKIEWICZ: I thought it was the 16th.

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1 THE CLERK: She leaves Sunday.

2 MR. LaRUSSO: You are not planning on sitting  
3 Friday?

4 THE COURT: No, but I will.

5 How long is she going away for?

6 THE CLERK: Let me ask.

7 (Pause)

8 MR. LaRUSSO: On this last e-mail, we introduced  
9 the bank statement of Mr. Ranford, I thought the  
10 government actually introduced it but I may be wrong. My  
11 only concern, it looks like they are looking for all the  
12 records regarding Mr. Ranford. We have another exhibit  
13 bank statement of his Charles Schwab account showing the  
14 \$1,000 he contributed and the 1,000 going back. I agree  
15 with the government, doesn't specifically ask.

16 I'm wondering if it's implying they are looking  
17 for Ranford, looking for all the evidence relative to it.  
18 I don't believe there is any dispute that these are  
19 accurate records. The question is whether or not the  
20 Court can find it to be part of that request or not.  
21 That's the reason I'm bringing it up.

22 THE COURT: I don't think it's part of that  
23 request. They are asking for one bank statement. If they  
24 said all documents related to Ranford, I would agree with  
25 you, all bank statements, but they don't ask for that.

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1 (Pause)

2 THE COURT: She is leaving on Monday for two  
3 weeks.

4 MR. HALEY: I don't want to interrupt the  
5 Court's process. I'm sure we are all of the thought that  
6 should she be excused we now, we'd bring back an  
7 alternate, that alternate will have to be brought up to  
8 speed.

9 THE COURT: I think the rule allows for 11. I  
10 will double-check that.

11 MR. LaRUSSO: I had a case, Judge, where an  
12 11-person verdict was rendered.

13 THE COURT: That would be an option. Obviously,  
14 I think we should sit Friday.

15 Everybody agree with that?

16 MR. LaRUSSO: Yes.

17 THE CLERK: They asked if they could stay late  
18 on Thursday.

19 MR. HALEY: They may be pleased to hear they can  
20 sit on Friday.

21 THE COURT: I will tell them they can sit late  
22 on Thursday and sit on Friday.

23 THE CLERK: I think one said they had an issue  
24 Friday because they wanted to know in the morning how late  
25 they could stay Thursday.

6168

1 MR. LaRUSSO: My hope is not to push them to a  
2 verdict, give them as much time as they need. Like I  
3 said, I know I'm available on the weekend. I have plans  
4 that I can cancel. I don't know -- I'm sure everybody has  
5 plans.

6 THE COURT: I can be here on the weekend too.

7 I don't know if you are going to have 12 people  
8 who want to come in on a Saturday or Sunday in July.

9 MR. LaRUSSO: I'm one of them.

10 THE COURT: What's the issue on Friday? She  
11 can't do it or part of Friday?

12 THE CLERK: I overheard them say about Friday.

13 THE COURT: I think we should tell them they can  
14 stay late tomorrow night.

15 THE CLERK: Some were asking how late; they have  
16 child care issues. How late would you have them?

17 THE COURT: They can stay as late as they want  
18 Thursday night, as late as they want.

19 MR. HALEY: And give them the option of Friday  
20 as well?

21 THE COURT: I will give them the option of  
22 Friday or Saturday or Sunday, whatever works for them.

23 Everybody good with that?

24 MR. HALEY: Yes.

25 MR. LaRUSSO: Yes.

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1 MR. MISKIEWICZ: Yes.

2 THE COURT: Anything else we need to discuss?

3 The testimony, again, especially in light of  
4 this new addition, I think that will take the full day  
5 tomorrow. I think that will be a really long readback.

6 When you said you made progress, you really  
7 isolated all the witnesses?

8 MR. HALEY: I will answer the Court's question.

9 Shimon Betesh is all Led Better, not that  
10 lengthy. Vince Tesoriero talked about Led Better, not  
11 that lengthy. Phil Kenner's testimony is actually not  
12 that lengthy in connection with Sag Harbor. That was one  
13 of the smaller spheres. There are, however, the need to  
14 isolate various aspects of testimony, the more  
15 time-consuming aspect of it from some of the other  
16 witnesses. I suspect those are short clips.

17 THE COURT: You haven't done that?

18 MR. HALEY: No.

19 THE COURT: Like for Mr. Peca and Mr. Berard and  
20 Mr. Kaiser.

21 MR. HALEY: No.

22 MR. MISKIEWICZ: Still working on that. Kaiser  
23 is substantial.

24 THE COURT: I would ask that you do that tonight  
25 and tomorrow morning.

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1 MR. MISKIEWICZ: We will. We will get here also  
2 early and try to agree. I will be here at 8:30, if you  
3 want. We have agreed on Mr. Betesh.

4 Do you need us to go over this last pile of  
5 exhibits?

6 THE COURT: I thought we did that. We went  
7 through that last pile.

8 MR. MISKIEWICZ: I thought so. I wanted to make  
9 sure.

10 MR. LaRUSSO: Those are the exhibits.

11 THE COURT: You read them all off. Do it one  
12 more time.

13 MR. MISKIEWICZ: The two exhibits they  
14 specifically requested are Government's 1513 and 2213.  
15 Then the remainder are Constantine Exhibits C169, 128,  
16 122, 215, 177 and C24.

17 MR. LaRUSSO: Judge, the exhibit they crossed  
18 out, 6601, I believe it's the authorization memo that the  
19 government introduced.

20 THE COURT: Does the government have 6601?

21 MR. MISKIEWICZ: 6601 is an e-mail from  
22 Mr. Kenner to Ranford and then an acknowledgment having to  
23 do with his authorization for the Global Settlement Fund.  
24 Mr. Constantine is not specifically referenced in this  
25 e-mail at all. It is Mr. Ranford's authorization for his

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1 money to go to the Global Settlement Fund.

2 MR. LaRUSSO: I thought the note talked about  
3 e-mails dealing with the relationship. Our position is  
4 it's part of the relationship.

5 MR. MISKIEWICZ: We don't have any objection.

6 THE COURT: You okay with that?

7 MR. HALEY: Yes, Judge.

8 THE COURT: That will be added.

9 So everyone agreed on that pile?

10 MR. LaRUSSO: Yes.

11 THE COURT: 6601 has been added.

12 Any objection to my deputy bringing those back  
13 and leaving them in the jury room?

14 MR. MISKIEWICZ: None whatsoever.

15 MR. LaRUSSO: C26 has an attachment. We wanted  
16 to make sure the attachment was in the copy we left.  
17 There was a copy we pulled out of the sleeve.

18 MR. OLIVERAS: It's right.

19 THE COURT: Mr. Haley, you are okay with these  
20 documents being put in the jury room so they are there in  
21 the morning?

22 MR. HALEY: Yes.

23 THE COURT: Mr. LaRusso?

24 MR. LaRUSSO: Yes.

25 MR. MISKIEWICZ: Yes, your Honor.



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1 THE COURT: Mr. Constantine, I changed my mind  
2 about 10:15. It's possible I could get here before 10:15.  
3 If there is a note or something, I don't want to do it  
4 without you.

5 DEFENDANT CONSTANTINE: Whatever you say.

6 THE COURT: Plan to be here.

7 Isolate Sag Harbor for the other witnesses.  
8 Tomorrow morning we will bring them out, we will do the  
9 three recordings and then we will start the readbacks.  
10 Anything else we have to address?

11 I will tell them they can sit as late as they  
12 want Thursday night and Friday if they wish and/or  
13 Saturday and/or Sunday. I think that's the best way to  
14 handle the situation at least at this point.

15 Obviously, they may be thinking if we don't come  
16 in with a verdict, we have to come back in two weeks. I  
17 don't think we have to address that because we have all  
18 day tomorrow left. If they ask that question, I can  
19 prepare something to say to them; what if we can't agree  
20 before juror number 1 has to leave. We have to decide  
21 what we are going to do at that point. We are not at that  
22 stage yet.

23 I asked my deputy. Juror Number 1 indicated she  
24 said something about a month ago or provided paperwork a  
25 month ago. I don't remember that. A month ago we thought

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1 it was crazy when one of them did have a July 16 problem,  
2 we were saying how crazy. We verified she did say  
3 something to us a month ago. I don't know if I put it on  
4 the record or not. We did not think at that point it was  
5 a concern I guess. I don't particularly remember that.

6 Anything else?

7 MR. MISKIEWICZ: No; not from the government.

8 MR. LaRUSSO: No, your Honor.

9 MR. HALEY: No, your Honor.

10 THE COURT: Have a good night.

11 (The trial was adjourned and then recalled.)

12 THE CLERK: Please be seated.

13 I appreciate everybody coming back and the  
14 Marshals making Mr. Kenner available. Everybody is  
15 present.

16 This note was handed to me. I got so distracted  
17 by the scheduling issue, I didn't look at it. But as I  
18 walked out the door, I guess as they were leaving...

19 I showed this note to counsel, Court Exhibit 13:  
20 We do not need the testimony read back for Led Better, Sag  
21 Harbor deal. We do not need to hear the recordings of the  
22 Led Better transaction.

23 You obviously don't have to work on that. It's  
24 a good thing. So tomorrow morning then there is nothing  
25 -- I will have Michele bring these documents now that we

1 put on the record, unless there is an objection, since I 6174  
2 will not bring them out.

3 Is there any objection to Michele telling them  
4 these are the documents responsive to their last note and  
5 to also tell them, so they are not wondering what the  
6 schedule is tomorrow, they can stay as late as they want  
7 tomorrow and that if they want, they can come back Friday  
8 too? Any objection?

9 MR. MISKIEWICZ: No objection.

10 MR. LaRUSSO: No, your Honor.

11 MR. HALEY: No, your Honor.

12 THE COURT: Thanks again.

13 (The trial was adjourned to Thursday, July 9,  
14 2015 at 9:30 a.m.)  
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